



Therefore, the ALJ found plaintiff not disabled at any time after April 1, 2008.<sup>1</sup> [Administrative Record (“AR”) 20].

### Standard of Review

The Commissioner’s denial of benefits should be disturbed only if it is not supported by substantial evidence or is based on legal error. Stout v. Comm’r, Social Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). “Substantial evidence” means “more than a mere scintilla, but less than a preponderance.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). “It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)(internal quotation marks omitted). The court is required to review the record as a whole and to consider evidence detracting from the decision as well as evidence supporting the decision. Robbins v. Social Sec. Admin, 466 F.3d 880, 882 (9th Cir. 2006); Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). “Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas, 278 F.3d at 954 (citing Morgan v. Comm’r of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.1999)).

### Duty to develop the record

Plaintiff contends that the ALJ erred in failing adequately to develop the record because plaintiff was not represented by counsel during the hearing, and the ALJ failed to obtain plaintiff’s treating source records. [AR 3-12].

The ALJ is not “‘a mere umpire’ during disability proceedings. Rather, the ALJ has ‘a special duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.’” Widmark v. Barnhart, 454 F.3d 1063, 1068 (9th Cir. 2006)(quoting Higbee v.

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<sup>1</sup> Plaintiff formerly received child’s SSI benefits for a mental disability. His eligibility for those benefits was redetermined by law when he attained the age of 18, and he was found no longer disabled under the disability standard applicable to adults. Plaintiff also applied for disabled adult child’s insurance benefits, which are available to a child of an individual who is entitled to old age or disability insurance benefits if the child is under a disability, as defined by the Social Security Act, and the disability began before the child’s 22nd birthday. See 42 U.S.C. § 402(d). That application also was denied on the ground that plaintiff was no longer disabled as of April 1, 2008. [See AR 12].

1 Sullivan, 975 F.2d 558, 561 (9th Cir. 1992)(per curiam) and Brown v. Heckler, 713 F.2d 441,  
 2 443 (9th Cir.1983)). When a claimant is not represented by counsel, “it is incumbent upon the  
 3 ALJ to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts.  
 4 The ALJ must be especially diligent in ensuring that favorable as well as unfavorable facts and  
 5 circumstances are elicited.” Vidal v. Harris, 637 F.2d 710, 713 (9th Cir. 1981)(quoting Cox  
 6 v. Califano, 587 F.2d 988, 991 (9th Cir. 1978)). The ALJ’s duty to develop the record is  
 7 heightened when a claimant’s ability to protect his interests is affected by a mental impairment.  
 8 Higbee, 975 F.2d at 561-562; Delorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991).  
 9 “When ‘the heavy burden imposed by Cox’ is not met, and the claimant may have been  
 10 prejudiced, ‘the interests of justice demand that the case be remanded.’” Higbee, 975 F.2d at  
 11 561 (quoting Vidal, 637 F.2d at 714-715 and citing Thompson v. Schweiker, 665 F.2d 936,  
 12 941 (9th Cir.1982); Cruz v. Schweiker, 645 F.2d 812, 814 (9th Cir.1981); and Cox, 587 F.2d  
 13 at 991).

14 Plaintiff appeared for the hearing without a representative, and both he and his father testified. The  
 15 ALJ engaged in a colloquy with plaintiff regarding the issues to be decided and plaintiff’s right to  
 16 representation. The ALJ explained that there were two cases before him with the same set of facts, one  
 17 involving childhood benefits, and the other involving “adult benefits as a child from your father’s account.”  
 18 [AR 23]. The ALJ told plaintiff that he had “been sent some notices in the mail,” and asked, “[h]as your  
 19 dad let you read any of them?” [AR 23]. Plaintiff said that he “didn’t know he was getting” any notices,  
 20 and had seen his father’s name on notices received in the mail, but not his own name. [AR 23-24]. Asked  
 21 by the ALJ whether he understood that he had a right to be represented in connection with the hearing,  
 22 plaintiff answered, “No.” [AR 24]. Plaintiff also answered “no” when asked if he understood how to obtain  
 23 a representative. [AR 24]. The ALJ proceeded to explain plaintiff’s right to be represented by an attorney  
 24 or a non-attorney representative during the hearing. [AR 24]. The ALJ asked plaintiff if he wanted to  
 25 proceed with the hearing or contact a representative, and plaintiff said that he wished to proceed. The ALJ  
 26 told plaintiff that he could “always appeal” an adverse decision and “get a representative at that time.” [AR  
 27 25]. Plaintiff said that he understood. [AR 25].

28 In response to questions by the ALJ about his treatment, plaintiff testified that he was taking

1 Seroquel and another medication whose name he could not remember. [AR 27]. He said that he previously  
2 had refused to take his medication for about three weeks because it made him twitch and feel sick, and he  
3 did not like taking it. [AR 28-29]. Plaintiff said that he saw the doctor once a month for medications, and  
4 that he also had “a therapist and a psychologist.” [AR 29]. He had not seen the therapist for “about a  
5 month” and believed he had missed an appointment. [AR 29].

6 Plaintiff said that he received his high-school diploma in 2008 and was taking a “water treatment  
7 program” class but did not like it. [AR 27, 30]. He had been “working for a school program in a cafeteria”  
8 but was “kicked out” for not listening to his work assignments and talking on his cell phone. [AR 26].  
9 Plaintiff said that he did not think he could work but he did not know why. [AR 27].

10 The ALJ told plaintiff that he had the report issued in plaintiff’s case by a disability hearing officer  
11 [see AR 61-64], and asked plaintiff if he remembered appearing before her. Plaintiff said that he did not.  
12 [AR 30].

13 Walter Preston told the ALJ “we just received the [hearing] notice 10 days before” and “didn’t have  
14 sufficient time to obtain the additional records [from] when [plaintiff] was a juvenile and . . .” [AR 31].  
15 The ALJ replied, “I already have those . . . We have his old file here. . . . You didn’t get here early enough  
16 to look at the file, but the file is here.” [AR 30]. The ALJ said that the file included documents from San  
17 Bernardino Unified School District, Aurora Charter Oaks Hospital, Dr. Linda Smith, and childhood  
18 disability records back to 2004. [AR 32; see AR 2].

19 Mr. Preston testified as follows. Plaintiff could not work because the medications did not allow him  
20 to focus or function in a work environment. Plaintiff was taking Seroquel, Depakote, Risperdal, and  
21 Fluoxetine, and was supposed to be taking Zyprexa also. [AR 33-34]. Plaintiff had been on Seroquel for  
22 a long time, but some of his other medications were fairly new. All of them had been prescribed by Dr.  
23 Nguyen. [AR 34-35]. Plaintiff had lived in group homes for a period of time and had been hospitalized.  
24 He had few daily activities, no friends, did not complete tasks, and had trouble sleeping. Plaintiff had been  
25 terminated from a prior job because of his “attitude” and failing to show up on time or follow commands.  
26 Plaintiff had been this way since he was young. He sometimes ran off for two or three days at a time. [AR  
27 35-37]. Plaintiff’s class was two days a week for two hours, but plaintiff was “not catching onto it.” [AR  
28 38]. Mr. Preston said that his son did not want to go to the doctor because he did not think he needed to,

1 but “I know he needs it.” [AR 38].

2 The record contains no treatment records from Dr. Nguyen or the treating therapist or psychologist  
3 plaintiff mentioned during the hearing. The only medical reports in the record concern plaintiff’s  
4 psychiatric hospitalization at Aurora Charter Oaks Behavioral Health from December 2 through December  
5 7, 2007. [AR 189-196]. Plaintiff was taken into custody by police and placed on a hold under California  
6 Welfare and Institutions Code section 5150 because he said that he wanted to kill himself and his father.  
7 [AR 189]. He was admitted, monitored, and given medication and psychotherapy. Among other things,  
8 it was noted that plaintiff reportedly was “exposed to drugs in utero” and was premature at birth. [AR 193].  
9 Plaintiff was discharged “to home accompanied by his father” with a referral for follow-up outpatient care.  
10 [AR 189-191]. His discharge diagnoses were impulse control disorder, not otherwise specified, rule out  
11 bipolar disorder. [AR 191]. He was not given any restrictions on physical activity. [AR 191].

12 In his hearing decision, the ALJ noted that plaintiff

13 alleges disability due to mental illness including schizophrenia and bipolar disorder.

14 However, the objective medical evidence does not reveal either diagnosis. At the hearing,  
15 [plaintiff] stated that he has refused to take medication or go to mental health treatment. He  
16 stated that his father is now making him take medications and see a therapist whom he had  
17 not seen in about a month.” [AR 16]. The ALJ also said that plaintiff “has no current  
18 treating source for his alleged impairments. Therefore, a consultative psychiatric  
19 examination was performed . . . .

20 [AR 17].

21 The ALJ found that plaintiff retained the RFC “to perform a full range of work at all exertional levels  
22 but with the following nonexertional limitations: the claimant can perform simple and semi-skilled jobs in  
23 a nonpublic setting. He has mild limitation getting along with others including supervisors and co-workers.”  
24 [AR 16]. In making that finding, the ALJ said that he gave “greatest weight” to the opinion of the  
25 nonexamining state agency psychiatrist, and he also relied on the “not inconsistent” opinion of the  
26 consultative examining psychiatrist. [AR 17-18, 197-203, 207-218].

27 In failing to obtain—or at least attempting to obtain—plaintiff’s current treating source  
28 records, the ALJ breached his duty to fully and fairly develop the record. The ALJ’s statement

1 that plaintiff had “no current treating source” for his mental impairments is contrary to the  
2 unambiguous testimony of plaintiff and his father that plaintiff was, and had been, seeing Dr.  
3 Nguyen for medication and a therapist or psychologist for counseling. The ALJ cited the  
4 absence of treating source records as a reason for ordering a consultative psychiatric  
5 examination, but there is no indication that he made any attempt to obtain the missing  
6 treatment records, either by initiating a request himself or by advising plaintiff to submit them  
7 after the hearing. The treating source evidence obviously might have been more favorable to  
8 plaintiff than the nonexamining and examining physicians’ reports. For example, the ALJ noted  
9 that the objective medical evidence did not contain any diagnoses of schizophrenia or bipolar  
10 disorder. [AR 16]. However, the only treating source evidence in the file, plaintiff’s December  
11 2007 hospital records, contained significant clinical findings and a “rule out bipolar disorder”  
12 diagnosis, with a referral for outpatient treatment. [AR 187-196]. The missing treating source  
13 records may include those diagnoses or other relevant diagnostic and clinical findings. At a  
14 minimum, obtaining the treating source records would ensure that the record was complete and  
15 that the ALJ was not giving undue weight to nontreating source evidence.

16 The ALJ also mischaracterized the evidence (and minimized the significance of the  
17 missing records) when he said that plaintiff testified that he had refused to take medication or  
18 receive mental health treatment. Plaintiff said that he temporarily stopped taking his  
19 medication for about three weeks, and he was seeing Dr. Nguyen about once a month. He said  
20 that had not seen his therapist for about a month, possibly because of a missed appointment,  
21 but he did not indicate that he had discontinued therapy. [See AR 27-29]. Plaintiff’s  
22 testimony that his father made him go to the doctor does not mean that the treatment plaintiff  
23 received was unnecessary.

24 In the circumstances of this case, the ALJ should have taken extra care to ensure that the  
25 record was fully and fairly developed. “The duty to provide an adequate record is of  
26 extraordinary importance when a person once found eligible for S.S.I. benefits may be in danger  
27 of losing them because he is too ill to act in his own best interests.” Higbee, 975 F.2d at 562;  
28 see Delorme, 924 F.2d at 849 (stating that the ALJ has a “basic duty to ‘inform himself about

1 facts relevant to his decision,” and that “[i]n cases of mental impairments, this duty is  
2 especially important”) (quoting Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987)).

3 Plaintiff was not represented by counsel. He had previously been found mentally  
4 disabled, and he alleged continuing mental disability. The ALJ found that plaintiff had a  
5 mental impairment that was at least severe. Furthermore, plaintiff testified that he was unaware of  
6 receiving notices regarding his case, did not understand his right to representation during the hearing, did  
7 not know how to contact a potential representative, and did not remember the prior hearing before a  
8 disability officer. Plaintiff’s father may have been acting as plaintiff’s de facto representative, but the ALJ  
9 did not make similar inquiries of Mr. Preston to ensure that he was adequately protecting his son’s interests.  
10 Moreover, Mr. Preston testified that he had only received the hearing notice 10 days earlier, and he indicated  
11 that was not familiar with the contents of plaintiff’s file until the ALJ summarized the exhibits.

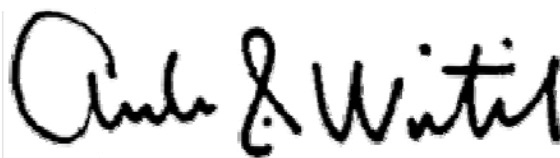
12 Under these circumstances, the ALJ had a heightened obligation to ensure the adequacy of the  
13 record. In failing to do, the ALJ committed reversible legal error. The appropriate remedy is a remand for  
14 further administrative proceedings so that the ALJ may conduct a new hearing and take such other action  
15 as is necessary to develop the record. See Higbee, 975 F.2d at 563.

### 16 Conclusion

17 The Commissioner's decision is not supported by substantial evidence and is not free of legal error.  
18 Accordingly, the Commissioner's decision is reversed, and the case is remanded to the Commissioner for  
19 further administrative proceedings consistent with this memorandum of decision.

20 **IT IS SO ORDERED.**

21 December 16, 2010

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24 ANDREW J. WISTRICH  
25 United States Magistrate Judge  
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